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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223134
Party	Plaintiff Under Armour, Inc.
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Attachments	Opp No 91223134 - Opposer's Mot to Strike Applicant's Affirmative Defenses.pdf(1457499 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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<p>UNDER ARMOUR, INC.,</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>URBAN ARMOR GEAR, LLC,</p> <p style="text-align: center;">Applicant.</p>	<p>Opposition No. 91223134</p> <p>Application No.: 86344909 Mark: UAG</p> <p style="text-align: center;"></p> <p>Filing Date: July 22, 2014</p>
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OPPOSER’S MOTION TO STRIKE APPLICANT’S “AFFIRMATIVE DEFENSES”

Under Armour, Inc. (“Opposer”) moves to strike Urban Armor Gear, LLC’s (“Applicant”) affirmative defenses from the Answer on the ground that they are insufficient, immaterial, and/or impertinent under Fed. R. Civ. P. 12(f) and Section 506 of the Trademark Trial and Appeal Board Manual of Procedure.

I. RELEVANT FACTUAL BACKGROUND

On August 5, 2015, Under Armour filed a Notice of Opposition against Application Serial No. 86344909 for the mark UAG for “apparel, namely, t-shirts, hats.” As grounds for its opposition, Opposer alleges likelihood of confusion under Section 2(d), 15 U.S.C. § 1052(d) (Opposition ¶¶ 22-24).

On September 14, 2015, Applicant filed its Answer, which includes three “affirmative defenses”:

- Paragraph 1 states that the “Notice of Opposition fails to state a claim upon which relief can be granted”;
- Paragraph 2 states that “Opposer’s claims are barred singularly and collectively, in whole or in part, by waiver or estoppel”; and

- Paragraph 3 claims that the “word ‘Armour’ is not an original phrase in the marketplace to which the consumer can be confused. The marketplace is crowded with other persons and entities and goods and services using the word ‘Armor’ or ‘Armour,’ that there can be no dilution. Examples of dozens of other “Armor” or ‘Armour’ based marks, include, but are not limited to, ‘Armour’ for food; ‘Tommy Armour’ for golf equipment and clothing; ‘Golden Armor’ for apparel; ‘Woody Armor’ for footwear, ‘Optical Armor’ for clothing; ‘Air Armor’ for vitamin supplements; ‘Weather Armor’ for footwear; ‘Armourshield’ for clothing; ‘Body Armour’ for clothing; ‘Liquid Armour’ for beverages (of which based on information and belief Opposer entered into a co-existence agreement); ‘Salon Armor’ for waistbands; ‘Armor Shield’ for footwear; ‘Martial Armor’ for protective pads for contact sports; and ‘Over-Armor Spec-Ops Brand’ and Design for clothing.”

II. ARGUMENT

Under Fed. R. Civ. P. 12(f), the Board may order stricken from a pleading any insufficient defense or redundant, immaterial, or impertinent matter. *See also* TBMP § 506.01. The Board may grant a motion to strike or, on its own initiative, strike from a pleading any insufficient defense. *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999). An affirmative defense assumes the allegations in the complaint to be true but nevertheless constitutes a defense to those allegations. *Blackhorse v. Pro Football, Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011). Stated another way, “[a]n affirmative defense does not negate the elements of the cause of action; it is an explanation that bars the claim.” *Id.* As detailed below, Applicant’s “Affirmative Defenses” fail on these grounds.

A. Applicant’s First Affirmative Defense Should Be Stricken as Insufficient and Improper

Applicant’s first “affirmative defense,” which alleges that Under Armour has failed to state a claim upon which relief may be granted, is insufficient and improper under Fed. R. Civ. P. 12(f). *See Blackhorse*, 98 USPQ at 1637 (“Failure to state a claim upon which relief can be granted is not an affirmative defense.”). To state a proper claim, Under Armour need only allege such facts that would, if proven, establish that (1) it has standing to challenge Applicant’s

applied-for mark, and (2) a valid ground exists for opposing the application. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ 185 (CCPA 1982); *American Vitamin Prods. Inc. v. DowBrands Inc.*, 22 USPQ 1313, 1314 (TTAB 1992).

Regarding standing, Under Armour must show a “real interest” in the nature of a direct and personal stake in the outcome of the proceeding to establish standing. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012) (affirming standing where the Board found that “because opposer’s registrations are of record, opposer has established its standing”). Under Armour has stated a “real interest” by pleading that it owns numerous valid and subsisting registrations for its UA marks. (Notice of Opposition ¶¶ 18-19.) Under Armour has also alleged prior use of its UA marks long before the filing date of the opposed application (and any date of first use that may be alleged by Applicant).

To state a claim of likelihood of confusion, Under Armour must plead that (1) the opposer’s mark, as applied to its goods or services, so resembles the applicant’s mark as to be likely to cause confusion, mistake, or deception; and (2) priority of use and/or registration. *See Hornby v. TJX Cos.*, 87 USPQ2d 1411, 1420 (TTAB 2008).

Here, Under Armour has stated a legally sufficient claim of likelihood of confusion. In particular, Under Armour has pleaded prior use and registration of its UA marks (Opposition ¶ 23); Under Armour has also alleged that “Applicant’s UAG mark so resembles Under Armour’s prior used, filed and/or registered UA Marks, as to be likely, when applied to Applicant’s goods, to cause confusion, to cause mistake, or to deceive under Section 2(d) of the Lanham Act, as amended, 15 U.S.C. § 1052(d)(c).” (Notice of Opposition ¶ 24.)

In sum, Applicant's first "affirmative defense" should be stricken as insufficient and immaterial. *American Vitamin Products*, 22 USPQ2d at 1314 (striking affirmative defense of failure to state a claim where the opposer established standing and a statutory ground for relief).

B. Applicant's Second Affirmative Defense Should Be Stricken as Insufficient to Provide Fair Notice of the Basis of the Defenses

Affirmative defenses must include sufficient detail to "give the plaintiff fair notice of the basis for the defense." TBMP § 311.02(b). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007) (holding that a pleading must include enough detail to give the adversary fair notice of the basis for each claim or defense); *Ohio State University*, 51 USPQ2d at 1294 (explaining that the primary purpose of pleadings under the Federal Rules is to give fair notice of the claims and defenses asserted). Applicant's second "affirmative defense" fails to do so. It alleges that "Opposer's claims are barred singularly and collectively, in whole or in part, by waiver or estoppel." This ambiguous claim fails to provide any specificity or fair notice as to any conduct that allegedly gives rise to the defenses or "waiver or estoppel," especially since the opposed application was only filed on July 22, 2014 and published on July 17, 2015. As such, Applicant has not pleaded facts sufficient to give Under Armour fair notice of the basis of these defenses and thus failed to meet the pleading standard under Rule 8(a)(2).

C. Applicant's Third Affirmative Defense Should Be Stricken as Impertinent and Immaterial

Applicant's third "affirmative defense" contends that the "word 'Armour' is not an original phrase in the marketplace to which the consumer can be confused" and that the marketplace is supposedly "crowded" with third-party uses of ARMOR/ARMOUR and there thus "can be no dilution." This is not an affirmative defense and, as stated, it has no bearing on the issues in the case. In its Notice of Opposition, Under Armour has asserted a likelihood of

confusion—but not dilution—between Applicant’s UAG mark and Under Armour’s prior-used and registered UA marks. Whether the word “Armor” is an “original phrase in the marketplace” and whether there “can be no dilution” is irrelevant to the likelihood of confusion between Under Armour’s UA marks and Applicant’s UAG mark.

III. CONCLUSION

In the interest of efficiency, and for the reasons discussed above, Opposer respectfully requests that the Board strike Applicant’s “affirmative defenses.”

Respectfully submitted,

Dated: October 8, 2015

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing OPPOSER'S MOTION TO STRIKE APPLICANT'S "AFFIRMATIVE DEFENSES" has been served via first class mail, postage prepaid upon Applicant at the following address of record on this 8th day of October, 2015.

JOHN M BOWLER
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A handwritten signature in cursive script, appearing to read "Jm Bowler", is written over a horizontal line.